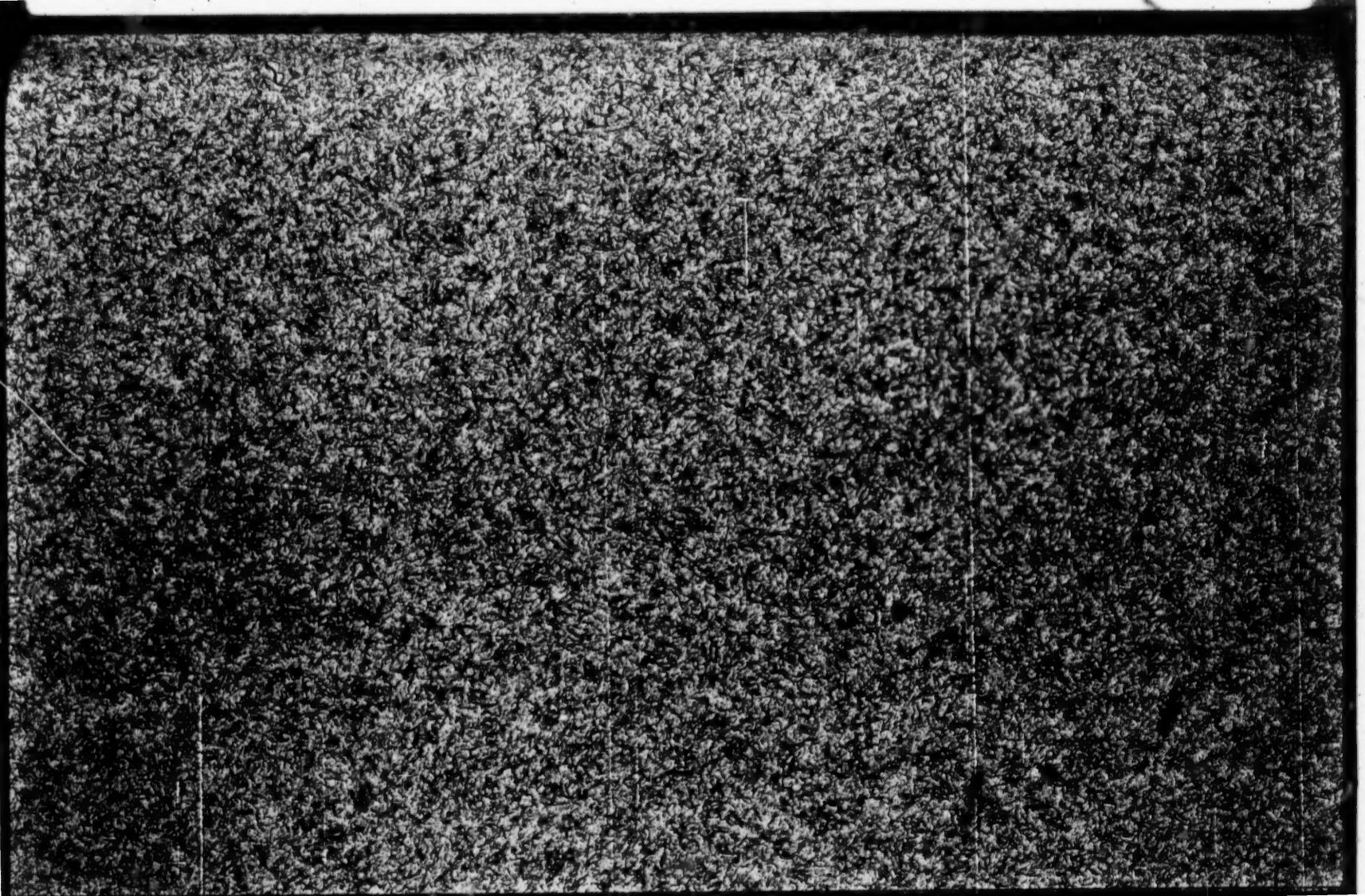

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, QUAKER BAKING COMPANY, CORPORATIONS FOR THEMSELVES AND OTHERS SIMILARLY SITUATED, APPELLANTS (PLAINTIFFS),

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA, APPELLEES (DEFENDANTS).

REPLY BRIEF OF APPELLANTS.

Appellants attack as unconstitutional an act of the 1931 Legislature of the State of Nebraska (R. 24), and the rules issued by the Deputy Secretary of Agriculture of Nebraska thereunder on June 24, 1931 (R. 25-27), and on September 19, 1931 (R. 28-29), for the following reasons:

POINT 1.

A maximum tolerance for standard loaves of bread over the weights fixed by the statute, rules and regulations is arbitrary, discriminatory and void, serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, and is not calculated to effectuate that purpose, but subjects bakers and sellers of bread to restrictions which are unreasonable and arbitrary, and is an improper exercise of the police power of the State. (Appellants' Brief, p. 15.)

POINT 2.

The unlimited power to prescribe excess tolerances, the time for which weights must be maintained, and to define "fancy breads," vested by the Statute in the Secretary of Agriculture, a ministerial officer, is contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (Appellants' Brief, p. 24.)

POINT 3.

The provisions of the statute and the rules and regulations with respect to the (a) time, (b) place, (c) possession and (d) particular loaves of bread required to comply with the statute, the violation of any one of which provisions would, under the statute, subject the appellants to a fine, irrespective of negligence, is a violation of the due process and equal protection clauses of the Fourteenth Amendment. (Appellants' Brief, p. 30.)

POINT 4.

The provisions of the statute, rules, and regulations fixing tolerances which are impossible of performance and

which require maintenance of the loaves of bread within this tolerance for an unreasonable length of time, are a violation of the due process and equal protection clauses of the Fourteenth Amendment. (Appellants' Brief, p. 38.)

POINT 5.

The provisions of the statute, and the rules and regulations referring to "fancy breads," which describe no known commodity; the provisions of the statute prohibiting the manufacture (not the sale) of loaves of bread differing from the standard weight, and the failure of the statute and the rules and regulations to define the crime of manufacturing overweight bread, all in conjunction with the statute, a penal statute creating a new offense, are not sufficiently explicit to inform appellants what condition would make them liable to penalties of the statute, and the statute and the rules and regulations are so vague that men of common intelligence must of necessity guess at their meaning, which is a violation of the due process and equal protection clauses of the Fourteenth Amendment. (Appellants' Brief, p. 43.)

POINT 6.

The statute, and the rules and regulations thereunder, prohibiting a twenty-ounce loaf of bread is not a valid exercise of the police power of the State, but is an arbitrary and unreasonable restriction upon appellants' right to do business and a violation of the due process and equal protection clauses of the Fourteenth Amendment. (Appellants' Brief, p. 51.)

Appellees contend that the act and rules are constitutional for the following reasons:

POINT 1.

In prescribing standard weights for loaves of bread the fixing of a maximum limit of weight or excess tolerance for each standard weight prescribed is useful and necessary and bears a reasonable relation to the purposes of the act and is not an arbitrary or capricious exercise of the police power. (Appellees' Brief, p. 10.)

POINT 2.

Even though the Court should hold that the maximum weight limit feature of the act is invalid, the remaining provisions of the Act should not be held void for that reason. (Appellees' Brief, p. 25.)

POINT 3.

The delegation of authority to the Secretary of Agriculture to prescribe administrative details in the enforcement of the instant act does not violate the Fourteenth Amendment. (Appellees' Brief, p. 26.)

POINT 4.

The provisions of the statute and the rules and regulations are plain and definite and do not subject appellants to unreasonable standards. Objections to the rules of the Secretary of Agriculture will not be considered in view of the failure of appellants to apply to the administrative board for a modification of the rules. (Appellees' Brief, p. 29.)

POINT 5.

The statute and the rules of the Secretary of Agriculture prescribe standards with which the appellants may reasonably comply. (Appellees' Brief, p. 35.)

POINT 6.

The business of the appellants is held on such reasonable conditions as may be imposed by the governing power of the State; and the fact that a reasonable exercise of the police power results in restrictions of appellants' business and imposes some inconveniences upon them does not render the law invalid. (Appellees' Brief, p. 41.)

These arguments of appellees can be summarized as follows:

First. That the act of the legislature is constitutional and if the Burns case holds otherwise the Burns case should be overruled.

Second. That appellants can not question the constitutionality of either the rules issued in June or the rules issued in September until a request is made that the rules be changed in a manner other than by suit.

Third. That if considered the rules are constitutional.

These will be considered in order.

I.

The Act is Unconstitutional.

The record shows that appellants, Petersen Baking Company, Schulze Baking Company, Continental Baking Company, and General Baking Company, represent an annual production of thirty million loaves of bread in Omaha, Nebraska (R. 278). The evidence fails to show one instance of the purchase from any appellant of a loaf of bread containing less bread than represented or called for on the label. There is further no evidence or charge in the record that any purchaser of bread from appellants was ever

deceived by the size or weight of any loaf manufactured by appellants. The evidence is uncontroverted that with a decrease in the cost of ingredients, the weight of the loaf is increased by appellants over the standard minimum weight (R. 289, 293, 101). The record contains no evidence of short weights, puffing, fraud, or deceit by any appellant.

The appellees agree that the purpose of the regulation of bread weights is to prevent fraud and deceit by short weight loaves of bread, and assert that the exercise by the legislature of the duty to prevent such fraud and deceit is a valid exercise of the police power. They go on, however, to assert that, if in the exercise of that police power the legislature could reasonably believe that their proposed legislation bears a reasonable relation to the prevention of fraud and deceit by short weight loaves of bread, then the legislature is the sole judge of the validity of that law.

Appellants do not agree with this statement of the law, and such a rule would be at variance with the holdings of this and other courts. The courts have the sole power to determine whether legislation, if passed, is within the powers of the legislature as laid down by the Constitution.

To follow the rule asserted by the appellees is equivalent to saying that if the legislature can find any grounds which they believe to be reasonable for the passage of proposed legislation, the courts are deprived of all power to determine whether such legislation is valid. In other words, the legislature would become the sole judge of the constitutionality of its work.

Appellants on the other hand, assert that while the legislature may determine the desirability or necessity of an exercise of the police power, it is a question for the courts to determine whether that power is exercised in a manner consistent with the Constitution. While it is within the power of the legislature to prevent fraud and deceit by short weight loaves of bread, it is within the power of the Court

to determine whether the law so passed invades the constitutional guarantees of the citizen.

Appellees assert that it is necessary and proper for the legislature to prevent fraud and deceit by short weight loaves of bread. Appellants agree.

Appellees assert that in order to accomplish this result it is necessary to fix not only a minimum weight below which loaves of bread must not be baked, but that it is also necessary to fix a maximum weight above which loaves will not be permitted. This appellants deny.

No difference exists between appellants and appellees as to the results to be accomplished, the prevention of fraud and deceit by short weight loaves of bread. They do differ as to the means of accomplishing that result.

Appellees cite the case of *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 516, which was a case concerning the packaging of lard, a commodity susceptible of exact weight control, with the reasoning of which decision as applied to lard appellants agree.

Appellants cite the case of *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, which is a case concerning bread, the very article here in controversy. It is to be noted that the *Burns Baking Co.* case was decided after the *Armour & Co.* case.

Appellees contend that the legislature of Nebraska had reasonable ground to believe that a maximum weight limit is a necessary part of the weight law, because several states have passed such laws and because of several reports referred to by them. Appellants submit that the question is not whether the legislature had reasonable grounds for its belief, but is whether or not the act is within the constitutional power of the legislature.

The fact that several states have passed weight laws containing maximum weight provisions, is no indication of the constitutionality of such provisions and it is especially to

be noted that of the states cited by appellees only the laws of Arizona and Minnesota were passed after the *Burns* case was decided. It is further to be noted that of the Acts of other states cited, the laws of Iowa, Ohio, and Alabama have been held unconstitutional (Appellants Brief 11) in so far as they fix maximum tolerances and that cases are now pending attacking these provisions in the laws of Indiana and Wisconsin.

As to the reports cited by appellees, they also were made prior to the *Burns* case with the exception of the press release mentioned on page 19 of appellees' brief.

The act makes it mandatory that the Secretary of Agriculture prescribe a tolerance above but not below the standard weights, and fixes no limitation on his exercise of this power. This provision is unconstitutional in that it serves no useful purpose, and its presence in the Act is definitely against the public interest. (Cases cited Appellants' Brief, Page 11.)

The Act further makes it mandatory that the Secretary of Agriculture fix the time for which weights must be maintained, and places no limitation upon his exercise of this power. This again is a delegation of at least questionable authority in light of the decision of the case of *P. F. Petersen Baking Co.* v. *Weaver,* quoted at length as appendix "A" to appellants' brief. The requirement that the Secretary of Agriculture must prescribe an extended period of time during which the baker must maintain his loaf weights without placing any limitation on this extended period of time and without limitation as to the place of weighing the bread or the number of loaves to be weighed is more than an administrative detail.

The Act excepts from its operation "fancy breads" but does not define fancy bread. The Secretary of Agriculture was not granted any authority to define the term but in his

rules of June 24, 1931 (R. 26), he provided "Fancy Bread, *as defined by the Secretary of Agriculture of the State of Nebraska,* shall not be considered as coming within the scope of the law." In his later rules he abandons this provision, apparently for the reason that the statute did not grant him authority to define it.

Appellees contend that the term "fancy breads" is a trade term of well-understood meaning in the baking industry and cite the testimony of two witnesses (R. 306 and 307). It is to be observed that both these witnesses were unable to define the term, while several other witnesses (R. 285, 294, 300, 302, 304) state that the term has no meaning other than that it refers to bread of superior grade or quality.

The act makes the manufacturing for sale of underweight bread a crime, when the record shows that because of conditions impossible to overcome appellants may manufacture bread which they would not sell.

Appellees contend that the statutory provision that "Every loaf of bread made for sale in the State of Nebraska" must comply with the requirements, is definite and that "the legislature did not intend to regulate the baking of bread in other States" (Appellees' Brief 34). If by this appellees mean that these provisions apply only to bread made in Nebraska, and if bread is not to be tested after delivery to retailer, consumers or transportation agency, what of the Quaker Baking Company, one of the appellants herein, whose plant is located in Council Bluffs, Iowa (R. 139), and which sells about 50 per cent of its bread production in Nebraska (R. 141) in direct competition to the remainder of the appellants whose plants are in Omaha, Nebraska? And if these provisions do not have this meaning, what of the manufacture by these Nebraska plants of bread which is intended to be sold in Iowa?

The above and foregoing provisions of the act creating a new offense are also not sufficiently explicit to inform appellants what conduct would make them liable to the penalties of the act, and the act is so vague that men of common intelligence must of necessity guess at its meaning.

Appellants further attack the act because it unlawfully delegates legislative authority to the Secretary of Agriculture, a ministerial officer.

The basis of appellants' attack is that:

First. The legislature cannot delegate power to a ministerial officer to do that which it cannot do itself, and

Second. The legislature cannot delegate power to a ministerial officer to establish by rule the essential elements of a crime, but that the legislature itself must create and define the crime.

Appellees under Point III of their brief cite certain cases which they assert represent a delegation of greater power than that here delegated. The court's attention, however, is invited to the fact that in each case which they cite the legislature did not delegate power to do that which it could not itself do, and that in each instance the legislative body did of itself create the "primary standard" and delegated power only to fill out the administrative details.

In the present case the object of the legislation is to prevent the sale to consumers of short-weight loaves of bread, and the primary standard consists of requiring that the consumer receive bread in a half-pound, pound, pound-and-a-half, or multiples of one-pound loaves. The power attempted to be delegated is not to fill in the details pertaining to these standards and to prevent the sale of short-weight loaves of bread, but is to "prescribe reasonable tolerances or variations in excess, but not under the weights mentioned * * * within which all loaves shall be baked,

and also the time for which said weights shall be maintained."

The act requires the ministerial officer to prescribe excess tolerances which the legislature could not itself do, and it further requires him to provide some extended period of time during which the weights must be maintained.

The statute fails to make any requirement as to the possession of the loaves to be weighed, or the place where the weighing is to take place, although the case of *P. F. Petersen Baking Company* v. *Weaver* (Appellants' Brief, Appendix "A"), previously decided, had held this point to be important. The statute did not delegate authority to the Secretary of Agriculture to supply this deficiency, although the Deputy Secretary has attempted to do so without authority.

The statute fails to make any requirement as to the number of loaves to be weighed to determine whether the baker is a law violator. Previous laws (R. 64, 124) had contained such provisions and this Court spoke of the necessity of such provisions in the *Burns* case. Again the statute did not delegate authority to the Secretary of Agriculture to make any rules upon this point.

II.

The Rules Issued are Before the Court.

Under every point in appellees' brief, appellees contend that neither the first set of rules issued by the Deputy Secretary of Agriculture prior to July 22, 1931, nor the second set of rules issued September 19, 1931, can be considered by the court because appellants did not first request the Deputy Secretary of Agriculture to specifically change the rules. In fact this seems to be the principal point in appellees' brief. As authority for this position they cite the *Red "C" Oil Manufacturing Company* case.

As appellants have stated in their original brief (Brief 26, 27), the act of the legislature is challenged as unconstitutional.

Appellants further contend that under the *J. P. King Mfg. Co.* and *Sultan Railway & Timber Co.* cases, decided since the *Red "C" Oil Mfg. Co.* case, that rules issued pursuant to Legislative Acts are Legislative Acts (Ap. Brief 26, 27).

Appellants further contend, as therein discussed, that the holding of the *Red "C" Mfg. Co.* case is not as contended by appellees.

Waiving these aside, for the sake of argument, and referring to the record in the case,

Appellants filed their original petition on July 22, 1931 (R. 1), and their amended petition on September 5, 1931 (R. 3), to which petitions are attached as exhibits, the first set of rules complained of in the petitions and issued by the Deputy Secretary of Agriculture (R. 25).

On September 30, 1931, appellees filed their answer, admitting the act of the legislature and their intention to enforce it, denying all else and setting up—

> "Further answering defendants allege that under the authority of said House Roll No. 51, the Department of Agriculture of the State of Nebraska on the 19th day of September, 1931, adopted rules and regulations with reference to the enforcement of said Act, a copy of which rules and regulations is hereto attached, marked "Exhibit A" and by reference made a part hereof" (R. 27, 28)

and then as such Exhibit A the rules of September 19, 1931, referred to by appellant in its brief as the second set of rules (R. 28, 29).

No other pleadings were filed by appellees in the case so that the record position of appellees is that of admitting the act, denying the first set of rules, and setting up as a

defense to the petition the fact that on September 19, 1931, nearly two months after the suit attacking the act and the first set of rules had been filed, and during the pendency of an injunction, that a second set of rules had been adopted and were in force and effect.

However, on page 61 of the record, a stipulation was dictated into the record, admitting that the first set of rules "were in force and effect and the rules and regulations at the time of the filing of the petition," and that the second set of rules were adopted by the Deputy Secretary of Agriculture during the pendency of the suit and injunction.

The position that appellees now take, it is evident, is not the position that was presented by the pleadings or considered by the trial court in its opinion (R. 31, 39). In fact, appellees not only plead and relied on the second set of rules, but urged that the Court consider them as applying to appellants and the determination of this case. Appellants contended that the first rules were before the Court. On this the trial court says:

> "In answer to the contention of plaintiffs that this Court should not take into consideration the new rules adopted subsequent to the filing of this case, this Court feels that its duty is otherwise and that if it did hold that the tolerance as first fixed was unreasonable it would merely result in a new rule being adopted and another suit filed to test the reasonableness of the new rule" (R. 38).

With appellee making this contention before the Court, the existence of the first set of rules admitted by stipulation, the existence of the second set of rules plead and made a part of the case by appellees, it now ill becomes appellees to object to the consideration of the rules which they adopted after the suit was filed and plead as a defence as in existence at the time of the trial.

III.

The Rules Issued are Unconstitutional.

The appellants attack the rules because they prescribe conditions which are impossible of performance, create a crime not created by statute, exceed the authority delegated by statute, are indefinite and uncertain.

The rules prescribe conditions which are impossible of performance. The appellants contend that the tolerances prescribed by both the first set of rules (R. 25-27) and the second set of rules (R. 29) are insufficient and that the baker, though using every known precaution, must of necessity at times violate these provisions. Appellees ignore the first rules, but contend that the tolerance fixed by the second rules is sufficient.

It may be well to again reiterate that the baker must scale at the divider such an amount of dough as he estimates will produce a loaf of legal size (R. 86, 101, 102, 279). Even if he does this the loaves when coming from the oven will vary in weight, and that these baking variations thereby become a very important part of the variations covered by the tolerance. A group of loaves scaled at 20 ounces will come from the oven averaging perhaps 18 ounces baked, but among this group will be found many loaves which weigh as much as 19 ounces, and many other loaves weighing as little as 16.25 ounces (R. 116). It follows that if any of the heavier loaves gain in weight at any time, or if the smaller loaves lose only a fraction of an ounce by evaporation during the two-hour period before wrapping, or within twelve hours after cooling, then the baker is liable to the penalties of the statute.

In contending that the maximum tolerance as fixed by the rules and regulations, is sufficient under the evidence, and that the variations in baking should not be considered,

appellees are overlooking not only the provisions of both sets of rules, but the record testimony concerning the process of baking bread.

The Act (R. 24), the first set of rules (R. 26), and the second set of rules (R. 29), all cover bread "made for sale" or "baked for sale" in Nebraska. The Act and both sets of rules then govern the *making or baking for sale* of loaves of bread. The undisputed evidence is that the baker has no control of the weight of the loaf of bread after the dough, from which the loaf is to be baked, leaves the divider (R. 86, 101, 102, 279). The baked loaf from this dough varies in weight due to many causes (App. Brief 32-33).

The record shows these baking variations on 168 loaves scaled in the dough at 20 ounces, varied from 16.25 ounces baked weight to 19 ounces (R. Summary 116). On 130 loaves scaled in the dough at only eleven ounces, the baked weights varied from 7.75 ounces to 10.5 ounces (R. 116). Both of these tests show on the same dough scaling a variation in the baked loaves of 2.75 ounces. After the loaf is baked, it may gain in weight under certain atmospheric conditions (R. 93, 101, 259, 264, 283, 73), or lose. A gain in one of the defendants' exhibits of one ounce in a baked loaf is shown between 216 and 240 hours after baking (R. 264). The evaporation losses in the baked loaf even within twelve hours after baking are as high as 3 ounces (R. 311). This shows an evaporation variation in the baked loaves of 4 ounces which, with a variation of 2.75 ounces in the baking, is a total possible variation of 6.75 ounces on a pound loaf of bread. It is accepted that if the baker is to scale his dough to produce a loaf between 16.25 and 19 ounces, he must scale the dough at around 20 ounces (R. 116). With these baking and atmospheric variations in the loaf of bread, it is impossible for the baker in scaling his dough for the loaf of bread to tell which loaves will

have the baking variations over or under the average. It is likewise impossible for the baker to predict the atmospheric conditions for hours after the bread is baked or "cooled". It is obvious then, in order not to sell short-weight bread in some instances, that the baker must scale the dough from which the loaf is to be baked so high that under all baking and atmospheric variations the loaf will always exceed the minimum standard weight. The result is that with a maximum tolerance, he must violate the law with many loaves of bread. Under the act and the first set of rules, the pound loaf of bread must weigh at all times for twelve hours after baking between 16 and 18 ounces. Under the act and the second set of rules, never over 19 ounces at any time after baking, and not under 16 ounces for 12 hours "after cooling".

The record evidence shows that this is impossible.

At pages 38 and 39 of appellees' brief, they attack the tests referred to in appellants' brief at page 40. To analyze these tests reveals their application.

The test at R. 113 shows twelve loaves scaled at 20½ ounces, which when coming from the oven weighed as much as 19½ ounces. The 19½ ounce loaf was an unlawful loaf when coming from the oven being overweight. At the end of twelve hours *after baking* another loaf weighed as little as 16¾ ounces, showing a variation of 2¾ ounces during the twelve-hour period.

The test at R. 114 shows loaves scaled at 20½ ounces, which when coming from the oven weighed as high as 19 ounces and other loaves of the same group weighed as little as 16 ounces within twelve hours after baking, a variation of three ounces.

The test at R. 115 shows loaves scaled at 20 ounces, which when coming from the oven weighed as much as 18 ounces, and other loaves of this same group weighed as little as 15 ounces within twelve hours after baking, a vari-

ation of 3 ounces, and several of these loaves were illegal at the end of the twelve-hour period on account of being short weight.

The tests at R. 116 showed that of 168 loaves scaled at 20 ounces some weighed as high as 19 ounces and others as low as 16¼ ounces *at the very time the loaves came from the oven* and before evaporation during the twelve-hour period *after cooling* had even commenced.

The tests on this same page of the record showed that of 130 loaves scaled at 11 ounces, some weighed as high as 10½ ounces and others as low as 7¾ ounces *at the very time the loaves came from the oven* and before the twelve-hour period *after cooling* had commenced to run. The tolerance permitted by the first rules (R. 27) on loaves of this size (the half-pound loaf) was one ounce, so by these rules some of these loaves were illegal as overweight loaves, and others were illegal as short-weight loaves, *at the very time they came from the oven.* The second rules (R. 29) permitted a tolerance of 1½ ounces on these loaves, but here again the heavier loaves were illegal as overweight loaves, and the lighter loaves were illegal as short-weight loaves, *at the very time the loaves came from the oven.* From this test it is apparent that if the baker is to be sure his loaves are to be full weight, he must scale his dough at about 11½ ounces, and in that event many of the loaves will be above the 1½ ounce tolerance permitted by the second rules (R. 29).

The tests at R. 310 show wrapped loaves, scaled at 19½ ounces, which when coming from the oven weighed as much as 18¼ ounces, and other loaves which weighed as little as 15 ounces twelve hours thereafter, a variation during this period on some of the loaves amounting to 3¼ ounces.

The tests at R. 311 show wrapped loaves, scaled at 20 ounces, which when coming from the oven weighed as much as 19¼ ounces, and other loaves which weighed as little as

15 ounces within twelve hours thereafter, a variation of 4¼ ounces.

As appellees say (Appellees' Brief, p. 39), the tests at the top of R. 312 show loaves scaled at 25 ounces, which approaches the standard 1½ pound loaf. This test, however, reveals that of these wrapped loaves, scaled at 25 ounces, some coming from the oven weighed as much as 24 ounces and others at the end of twelve hours weighed as little as 19 ounces, a variation of 5 ounces. This is a greater variation than is permitted by either the first rules (R. 27) or the second rules (R. 29) on the full 1½ pound loaf.

The tests at the bottom of R. 312 show wrapped loaves scaled at 20 ounces some of which weighed as much as 18½ ounces when coming from the oven, and others of which weighed as little as 15 ounces within twelve hours thereafter, a variation of 3½ ounces.

Appellees contend that the average weight on five loaves is to be considered since the Deputy Secretary of Agriculture has provided in his rules that five loaves "if available" are to be averaged to determine weight. There was no statutory authority for the Deputy Secretary to adopt this rule, but disregarding that fact, for sake of argument, it is just as possible for the inspector to select from the large daily output of appellant bakeries, five loaves which will exceed or fall below the fixed weights, as it was to pick out 25 loaves under the Act considered in the *Burns* case.

In the *Burns* case, which considered the 1921 Nebraska bread weight law, this Court observed that the inspector might select the 25 or more loaves to be weighed to test compliance with the act. In the law now under consideration the inspector is not required to select more than a single loaf to test compliance, and even under the rules (R. 27 and R. 29) may test this compliance by the selection of only five loaves, and even a lesser number if he considers five loaves not "available."

And what of the loaves which exceed the excess tolerance? If a loaf gains weight at any time, no matter how old it may be and no matter in whose possession it may be, the baker incurs the penalties of the statute. The appellees state that this objection is without merit and that

> "it is not argued that the evidence or any theory of the art of breadmaking shows that the bread INCREASES in weight after baking"

and argues that any such provision would be useless and absurd (Appellees' Brief, p. 32).

This argument reveals a lack of knowledge of the record. The predominating thought throughout the entire record is that a loaf of bread is like a sponge (R. 86) and that it will evaporate moisture during dry weather, or will add moisture and weight during moist, wet weather (R. 93, 101, 259, 264, 283, 73). The appellees' own tests show instances of increase in loaf weights after baking. At R. 259, line 8, columns 7 and 8, show an increase of ⅛ ounce. Also appellees' tests at R. 264 under Raisin Wrapped bread, line 5, columns 3 and 4, show a gain of one ounce, while Health Wrapped bread on the same page, line 3, columns 3 and 4, show an increase of ¼ ounce. These tests of Appellees themselves show that bread may and frequently does increase in weight after baking.

Under Point V of their brief, appellees admit that a large part of the evidence herein consists of the transcript of the evidence in the *Burns Baking Co.* case, and of the evidence in the *P. F. Petersen Baking Co.* v. *Weaver* case, and they assert that there is nothing to show that baking conditions are similar now to those in vogue when the evidence in these cases was taken. They overlook the testimony of appellants' witnesses (R. 277 to 305) which show the present methods and conditions to be identical with those prevailing when the previous testimony was taken.

The creation by rule of a new crime, the offense of making for sale overweight bread, is fully discussed under our Point I hereof, except that the conditions laid down by the rules are more exacting than those laid down by the statute.

The rules exceed the authority extended by the statute. It is apparent from an examination of the statute (R. 24) that no authority was extended thereby for the adoption of rules 1 to 8 inclusive, and rules 12, 13, and 14, of the rules of June 24, 1931 (R. 25, 26, 27).

The Deputy Secretary of Agriculture abandoned these rules on September 19, 1931, when he adopted new rules (R. 28, 29).

The alleged grant of legislative authority provided that the Secretary of Agriculture

> "shall prescribe reasonable tolerances or variations in excess, but not under the weights mentioned in the preceding section, within which all loaves shall be baked, and also the time for which said weights shall be maintained."

This delegation of authority does not extend to the Secretary of Agriculture power to adopt the last provisions of Rule II (R. 29) which reads:

> "The baker of such bread, however, shall not be responsible for the maintenance of said minimum weight after delivering the same to a retail dealer or consumer, or to a transportation agency in Nebraska for delivery to a retail dealer or consumer."

Also the statute did not delegate authority to adopt Rule III (R. 29) which reads:

> "Weights shall be determined by averaging the weight of not less than five loaves, if available, of a given lot of bread of the same grade, size, and baking."

Shorn of these provisions the rules are even more arbitrary and unreasonable.

The indefiniteness and uncertainty of the rules are apparent.

The rules apply to "bread baked for sale in Nebraska." The uncertainty of this term is discussed under Point I hereof.

The uncertainty of the commencement of the tolerance period which runs for twelve hours "after cooling" and "under normal conditions" was discussed at length in Appellants' Brief, pages 47, 48, and was thus answered in Appellees' Brief page 34.

> "'After cooling' and 'under normal conditions' must be given the plain, ordinary meaning of the language used, and it is obvious there is nothing uncertain about them. 'Cooling' of bread is also a trade term and the Petersen Baking Company maintain a cooling room in their factory (R. p. 150)."

The evidence in the record fails to show one word of testimony to justify the statement that "cooling" of bread is a trade term. Bread is baked in an oven of a temperature of from 450° to 500° Fahrenheit (R. 71). The baked loaf of bread gives off heat until it equals the surrounding temperature. The highest temperature recorded for Nebraska in the Weather Bureau Report shows 105° Fahrenheit (R. 314c). This indicates under the most favorable conditions a cooling for 345°.

The inference in the last of appellees statement quoted above is that bakeries maintain a temperature controlled cooling room. The testimony of Mr. Petersen referred to by appellees shows this is not so. Milton Petersen, however, explains the situation:

> "The loaves when baked are put on racks in the bakery room or in some of the other rooms in the,

plant to cool. No room is especially arranged for the cooling of bread and the only ventilation is by opening or closing windows, or such like" (R. 102).

Dr. Harry E. Barnard says:

"The conditions in the dough room where fermentation takes place, are controllable in the modern bakery, because such room is built with insulated walls and the temperature can be controlled, but that is the only place" (R. 87).

Certainly hot baked bread has no place in a dough room.

Conclusion.

Appellants therefore respectfully urge that said act of the Nebraska Legislature and the rules and regulations issued thereunder be declared unconstitutional in the particulars herein set forth, and that the decision of the Supreme Court of Nebraska be reversed.

JOHN C. GROVER,
HAROLD D. LE MAR,
Counsel for Appellants.